IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

CRL.A.No. 825 of 2000(B)

CC.32/1999 of ENQUIRY COMMR. & SPL. JUDGE (PREVENTION OF CORRUPTION ACT), THRISSUR

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APPELLANT: ACCUSED:

N.A.MOHAMMED, S/O.ADIMA, NEDUMPARAMBIL HOUSE, ERIYAD VILLAGE - DESOM, KODUNGALLUR TALUK (MINISTERIAL HEAD WARDEN, SUB JAIL, CHAVAKKAD)

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT/COMPLAINANT:

STATE OF KERALA (DY.S.P.VIGILANCE AND ANTICORRUPTION BUREAU), THRISSUR, V.C.NO.3/96)- REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14/06/2007, THE COURT ON 4-7-2007 DELIVERED THE FOLLOWING:

Crl.M.P.Nos. 5847/2000 & 100/2001
in
Crl.A.No. 825 of 2000

Dismissed.

4th July,2007

Sd/-K. Thankappan,
Judge.

K.Thankappan,J.

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Crl.L.P.No. /2006

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Judgment

-12-2006

K. Thankappan, J.

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Crl. A. No. 825 of 2000

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JUDGMENT

Appellant was the accused in C.C. No.32/99 on the file of the Enquiry Commissioner and Special Judge (Prevention of Corruption Act), Thrissur. He faced trial for offences punishable under section 7 and 13(1)(d) of the the Prevention of Corruption Act, 1988, here-in-after referred to as "the Act". The prosecution case against the appellant is that while the appellant was working as the Ministerial Head Warden at Sub Jail, Chavakkad, he demanded illegal gratification of Rs.100/- on 21-8-1998 at about 11 A.M. from PW1 for permitting him to visit his friend Sunilkumar, who was under the judicial custody at the Sub Jail, and in pursuance of the said demand he accepted Rs.100/- from PW1 at about 3.40 P.M. on 21-8-1998 at the Sub Jail and thereby committed the offence charged against him. To prove the case against the appellant, the prosecution examined PW1 to 8 and relied on Exts.P1 to P9. MOI to MOVI were also marked on the side of the prosecution. After closing the prosecution

evidence, the appellant was questioned under section 313 Cr.P.C.. He denied the prosecution allegation and stated that he had not demanded or accepted any bribe as alleged by the prosecution. He also stated that he was innocent in the case. Exts.D1 and D2, C.D. Contradictions of PW2 and the photostat copy of F.I.R. in vigilance Crime No.3/98 of Vigilance and Anti-Corruption Bureau, Thrissur, were also marked on the side of the defence. After considering the evidence, the court below found that the appellant guilty of the offences punishable under sections 7 and 13(1)(d) read with section 13(2) of the Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/- and in default to undergo simple imprisonment for one year for offence punishable under section 7 of the Act and sentenced to undergo simple imprisonment for four years under section 13(1)(d) read with section 13(2) of the Act. The court below ordered that "the substantive sentence of imprisonment shall run concurrently". The benefit under section 428 Cr.P.C. was also allowed by the trial court. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. This Court heard learned counsel for the appellant Sri.P.Vijayabhanu and learned Public Prosecutor .

3. The learned counsel for the appellant raised four contentions in attacking the impugned judgment. Firstly, it is contended that the trial court went wrong in accepting the evidence of PW2, PW7 and PW8 to find the appellant guilty, as PW1 turned hostile to the prosecution and he had not supported the prosecution case. Secondly, it is contended that the trial court went wrong in believing the evidence of PW2 with regard to the demand and acceptance of bribe as alleged by the prosecution without any corroboration. Thirdly, it is contended that even if the evidence of PW2 is believed with regard to the demand and acceptance of the bribe on the basis of Exts.P2 and P4, it is not possible to hold that MO1 currency note of Rs.100 was received by the appellant, as PW1 himself stated that he himself placed marked currency note underneath the writing pad of the table of the appellant. Lastly, it is contended that when FIR was registered, there were two accused and when the final charge was filed the appellant alone was

made an accused and the prosecution has not offered any explanation for the deletion of the other accused.

4. Question to be considered in this appeal is whether the judgment of the trial court is sustainable or not?

5. The specific case set up by the prosecution against the appellant is that when PW1 wanted to visit his friend Sunil Kumar, the appellant demanded illegal gratification of Rs.100/-. So, PW1 furnished Ext.P1 complaint before the police. According to him, he produced Rs.100/- and after applying the phenolphthalein powder the currency note was entrusted to him and he along with PW8 and others proceeded to the Sub Jail. He stated that he entered into the room and placed MO1 note on the table of the appellant. Thereafter, the Dy. S. P. and others came to the room and caught hold of the appellant and recovered the amount from the table. A phenolphthalein test was conducted at the spot, which indicated positive results on the hands of the appellant at the relevant time. It is seen that PW1 who filed the complaint stated that he placed marked currency note on the table of the appellant. He remained hostile to the prosecution. Exts.P2 series

of contradictions were brought in by the prosecution. So, the evidence of PW1 is not helpful to the prosecution. PW1 had not stated anything regarding the demand and acceptance of the amount. Hence, the trial court had mainly relied on the evidence of PW2 who accompanied PW1. PW2 stated that on the day of the trap, she and two Police Constables went along with PW1 to the Sub Jail. She sated that PW1 handed over MO1 note to the appellant and the appellant received the note and placed the same beneath writing pad on the table. Thereafter, she came out of the room and gave signal. The trap team arrived along with PW8. PW8 questioned the appellant. She also stated that the solution test conducted on the right hand of the appellant showed positive result. The court below relied on the evidence of PW2 alone to find the appellant guilty.

6. As per the principles laid down by the Apex Court reported in Ram Prakash Arora V. State of Punjab (1972) 3 SCC 652, the evidence of trap witnesses must be tested like other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person. In an decision of

the Apex Court reported in Major E.G.Bursay V. State of Bombay (AIR 1981 SC 1762), the Apex Court held that though, a trap witness was not an approver, he was certainly an interested witness in the sense that he was interested to see that the trap laid by him succeeded. He should at least be equated with a partisan witness and it would not be admissible to reply upon his evidence, without corroboration. In this context, the case set up by the appellant is relevant. The appellant had stated even at the time of Ex.P4 recovery mahazar that he neither demanded nor accepted any bribe. As per the version of PW1, he placed MO1 note on the table of the appellant. As per the evidence of PW2, from his pocket PW1 took the note and handed over the amount to the appellant who in turn received the note and placed the note beneath the writing pad. There is difference in the versions of PW1 and PW2 with regard to the payment and receipt of MO1 note. There is doubt with regard to the recovery also. The trial court found that there were corrections, omissions and in-consistency in the F.I. Statement and F.I.R. when compared with Ext.D2.

7. The prosecution case is that the phenolphthalein test which was conducted on the hand of the appellant showed positive results and from beneath the writing pad PW7 recovered MO1 note and the residue of the solution was taken into MO3 and MO4. It has come out in evidence that when MO3 to MO6 bottles brought to the court, the bottles were found empty. In this context, learned counsel for the appellant invites the attention of this Court to a Full Bench decision of the Gujarat High Court reported in Rameshchandra Tukaram Talakar V. State of Gujarat (AIR 1980 Guj. 1). In the above decision the Gujarat High Court held that it was necessary for the investigating agency to preserve the solution used for the experiment as regards detection of phenolphthalein powder on the person of the accused or on his clothes or anything that he had founded. In case of failure or omission of the investigating agency to preserve such solution, it was open to the Court to raise an inference adverse to the prosecution at the trial, depending upon the facts and circumstances of such case and to determine upon the impact of that inference on the other evidence before it. In the case in hand the solution, which has turned pink, was

not preserved by the investigating agency. PW8 Dy. S. P. had not offered any explanation regarding the non-preservation of the solution. In this context, though PW6, independent witness, was present in the office of the appellant at the time of incident he had stated that he had not seen any demand or acceptance made by the appellant. Though this witness turned hostile to the prosecution, his presence has been admitted by PW2, PW7, PW8 and even PW1. In cross-examination PW1 had stated as follows:- "അപേക്ഷ എഴുതിയത് പോക്കറ്റിലാണ് വച്ചത്. 100 രൂപ note വച്ച പോക്ക്റ്റിൽ തന്നെ ആണ് അപേക്ഷ വച്ചത്. ഒരുപോക്കറ്റ് ആണ് ഉള്ളത് . അപേക്ഷ പോക്കറ്റിൽ നിന്നും എടുത്ത് പ്രതിക്കു നൽകി . പ്രതി അപേക്ഷയും ആയി Supdt. ന്റെ മുറിയിൽ പോയ സമയമാണ് ഞാൻ note മേശപ്പുറത്ത് വച്ചത്. According to PW2, അതിനു ശേഷം PW1 pocket-ൽ നിന്നും warden പ്രതിക്ക് mo1 note നല്കി. പ്രതി ആ note വാങ്ങി ടിയാന്റെ മേശപ്പുറത്തിരുന്ന writing pad- ന്റെ അടിയിൽ വച്ചു. The non-preservation of the solution by the investigating agency is also relevant in the facts and circumstances of the case. Apart from the above, from Ext.P1, it was evident that there was no demand from the

appellant at all. All these relevant aspects of the case seem to have been completely overlooked by the trial court. Mere recovery of the currency note and positive result of the phenolphthalein test are not enough in the peculiar facts and circumstances of the case to establish guilt of the appellant. In the above circumstances, the acceptance of the marked currency note by the appellant as spoken to by PW2 requires independent corroboration. There is no independent corroboration to come to the conclusion that the appellant had received the amount from PW1. Hence, this Court is of the view that the prosecution has not succeeded in proving the case beyond doubt against the appellant.

8.. It is to be noted that as per Ext.P1 F.I.S., two Wardens demanded bribe for permitting PW1 to visit his friend, but in box PW1 had no such case. In Ext.P9 it is only stated that the investigation revealed that Varghese was not involved in the commission of crime. It is also to be noted that in Ext.P1(a) Varghese was the 2nd respondent. No investigation was also conducted on the basis of Ext.P1(a). At the same time it has come out in evidence that Varghese was present on

21-8-1998 also when the crime was detected by PW8. Hence, these facts create doubt on the prosecution case.

9. In the light of the discussions made in this judgment, this Court is of the view that the findings entered by the trial court are not sustainable and the prosecution has failed to prove the case against the appellant. Hence, benefit of doubt has been given to the appellant. Accordingly, the judgment of the trial court is set aside and the appellant is acquitted. Bail bonds of the appellant stand cancelled.

The appeal is allowed as above.

4th day of July,2007

K. Thankappan,
Judge.

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K. Thankappan, J.

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Crl.A.No. 825 /2000

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Judgment

4-7-2007